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an incorporeal hereditament. But this is commonly the limitation of the doctrine;<sup>8</sup> and to this extent there is, on the whole, unanimity.

The confusion arises in two ways. In the first place, privity of estate is frequently extended to include covenants imposing affirmative duties on the covenantor, as creating easements of a spurious nature.<sup>9</sup> And the courts, not unnaturally, have differed as to what covenants may properly come within this class.<sup>10</sup> In the second place, a few courts have added a new principle, that a covenant contained in an instrument conveying the fee<sup>11</sup> runs with the land, if such is the intent of the parties, and if the burden is one which, consistently with public policy,<sup>12</sup> can be imposed on the land. Thus it was recently held that where in a deed conveying the fee, the grantee, a railroad company, covenanted to build and maintain a station on the land granted, the grantee in fee of the covenantor was bound by the covenant. *Louisville, H. & St. L. Ry. Co. v. Baskett*, 121 S. W. 957 (Ky.).<sup>13</sup> This principle is preferable to that definition requiring always the existence of an incorporeal hereditament. In the first place, it has been pointed out that privity of estate formerly meant merely succession to the title of a party to the covenant.<sup>14</sup> And the historical basis for recognizing as easements obligations imposing active duties on the owner of the servient tenement is not entirely satisfactory: probably all the old cases can be explained as local customs.<sup>15</sup> It is submitted, moreover, that the doctrine of the main case is a simpler and more straightforward way of carrying out the intention of the parties, while at the same time avoiding the evils of unduly restricting the use and alienation of land,<sup>16</sup> or forcing an unexpected burden on an innocent purchaser. For by limiting<sup>17</sup> the doctrine to covenants in the deed passing the estate with which the burden is to run, the protection of the recording acts is secured.

**IMPUTED NEGLIGENCE.** — The law of imputed negligence is gradually crystallizing into two general rules. When A sues B, his recovery is barred by the contributory negligence of C (1) when the law identifies A with C,

<sup>8</sup> *Hurd v. Curtis*, 19 Pick. (Mass.) 459.

<sup>9</sup> *Bronson v. Coffin*, 108 Mass. 175.

<sup>10</sup> Compare *Hurd v. Curtis*, *supra*, with *Horn v. Miller*, 136 Pa. St. 640; and *Wheeler v. Schad*, 7 Nev. 204, with *Farmers' Canal & Reservoir Co. v. New Hampshire Real Estate Co.*, 40 Colo. 467.

<sup>11</sup> The burden has been held not to run with the grant of an incorporeal hereditament. *Barringer v. Virginia Trust Co.*, 132 N. C. 409. Obviously where the estate conveyed is less than a fee, there is the relation of landlord and tenant.

<sup>12</sup> The cases cited in note 16 are examples of the limitation imposed by public policy.

<sup>13</sup> *The Georgia Southern Railroad v. Reeves*, 64 Ga. 492, *accord*. See *Sexauer v. Wilson*, 136 Ia. 357; *Conduitt v. Ross*, *supra*.

<sup>14</sup> HOLMES, COMMON LAW, 404; SIMS, COVENANTS, 69. See *Norcross v. James*, 140 Mass. 188.

<sup>15</sup> See *Tenant v. Goldwin*, Ld. Raym. 1089. Cf. *Yielding v. Fay*, Cro. Eliz. 569; *Lawrence v. Jenkins*, L. R. 8 Q. B. 274; *Inhabitants of Middlefield v. Church Mills Knitting Co.*, 160 Mass. 267, may be explained as creating a charge on the land, rather than an active duty.

<sup>16</sup> For example, by holding that the covenant does not "touch or concern" the land, *Costigan v. Pennsylvania R. R. Co.*, *supra*; or is in restraint of trade, *Tardy v. Creasy*, *supra*; or hampers alienation, *Haeussler v. Missouri Iron Co.*, 110 Mo. 188.

<sup>17</sup> *Wheeler v. Schad*, *supra*. *Contra*, *Robbins v. Webb*, 68 Ala. 393.

as in the case of principal and agent, master and servant; and (2) when A is the nominal plaintiff but C is the real beneficiary.

As the principal is liable for the torts of his agent, so the contributory negligence of the agent, within the scope of his employment and course of business, is imputed to the principal on the familiar doctrine that *qui facit per alium facit per se*.<sup>1</sup> In other relations, also, negligence has been imputed from one person to another; as, for example,<sup>2</sup> from parent to child,<sup>3</sup> from bailee to bailor.<sup>4</sup> In any of these relationships an agency may occur; and if so, it needs no extension of the rule to impute negligence.<sup>5</sup> But such relationship does not necessarily involve an agency; and unless there is an agency in fact, with its fundamental right of control, by the better opinion a fictitious agency will not be raised in order that negligence may be imputed.

The second rule is evidenced under statutes allowing compensation for injuries caused by death by wrongful act. Whether expressly so stated or not in these statutes, they are construed as providing that the negligence of the deceased bars recovery.<sup>6</sup> As to whether they should be construed to make the negligence of the beneficiary a similar bar, there is a conflict. Some courts hold that the plaintiff stands so squarely in the shoes of the deceased that they will not consider the negligence of a technical outsider, even though he be the beneficial party to the suit.<sup>7</sup> Directly *contra*, however, is a recent case voicing the majority view.<sup>8</sup> *Scherer v. Schlager*, 122 N. W. 1000 (N. Dak.). Although where the negligent person is only one of several beneficiaries the rule may well be otherwise,<sup>9</sup> yet where the sole distributee or next of kin is negligent he should not recover, whether he sues in his own name, or as administrator, or whether another sues as administrator for his real benefit.<sup>10</sup> Herein lies the real strength of the minor-

<sup>1</sup> Page v. Hodge, 63 N. H. 610.

<sup>2</sup> Other examples are: (a) From husband to wife, *Prideaux v. City of Mineral Point*, 43 Wis. 513, 528; *contra*, *Platz v. City of Cohoes*, 24 Hun (N. Y.) 101. (b) From public carrier to passenger. The case of *Thorogood v. Bryan*, 8 C. B. 115, though later overruled in England by *The Bernina*, 12 Pr. Div. 58, has been followed in several states. *Philadelphia, etc. R. R. Co. v. Boyer*, 97 Pa. St. 91; *contra*, *Little v. Hackett*, 116 U. S. 366. (c) From private driver to person driven, *Mullen v. City of Owosso*, 100 Mich. 103; *contra*, *Pyle v. Clark*, 79 Fed. 744.

<sup>3</sup> *Hartfield v. Roper*, 21 Wend. (N. Y.) 615. *Contra*, *Newman v. Phillipsburg Horse Car Co.*, 52 N. J. L. 446.

<sup>4</sup> *Welty v. Indianapolis, etc. Ry. Co.*, 105 Ind. 55; *Ill. Cent. R. R. Co. v. Sims*, 77 Miss. 325. *Contra*, *Sea Insurance Co., etc. v. Vicksburg, etc. Ry. Co.*, 159 Fed. 676; *N. Y., L. E., etc. R. R. Co. v. New Jersey Electric Co.*, 60 N. J. L. 338.

<sup>5</sup> *Kessler v. Brooklyn Heights R. R. Co.*, 3 N. Y. App. Div. 426 (Driver, common enterprise); *Davis v. Guarnieri*, 45 Oh. St. 470 (Husband and wife).

<sup>6</sup> TIFFANY, DEATH BY WRONGFUL ACT, § 66.

<sup>7</sup> *Consolidated Traction Co. v. Hone*, 59 N. J. L. 275; *Wymore v. Mahaska County*, 78 Ia. 396.

<sup>8</sup> *Plouf v. Burlington Traction Co.*, 70 Vt. 509; *Richmond, etc. R. R. v. Martin's Adm'r*, 102 Va. 201 (overruling *N. & W. R. R. v. Groseclose's Adm'r*, 88 Va. 267). The attempt in *Tucker v. Draper*, 62 Nebr. 66, to reconcile the conflict on minor statutory details is unsound.

<sup>9</sup> *Davis v. Guarnieri*, 45 Oh. St. 470; 2 Ill. L. R. 487 (the ablest exposition of the whole matter).

<sup>10</sup> At law X is a distinct person from X, administrator. When, therefore, the plaintiff is not a beneficiary, his negligence should not bar recovery. KINKEAD, TORTS, § 475, takes the ground that this entire matter is not a question of imputed negligence at all, but direct contributory negligence. But whether the result is obtained by say-

ity view which imputes the negligence of the parent to a child *non sui juris*; for, although technically the recovery is solely for the use of the child,<sup>11</sup> practically the negligent parent is sole beneficiary. For a similar reason, where a wife sues with her husband joined for conformity, his right to the damages is reason for imputing his negligence to her.<sup>12</sup> And conversely, it should not be imputed where she recovers independently.<sup>13</sup>

At common law the parent or husband has an independent action for torts committed against his minor child or his wife, to which his own negligence is, of course, a bar.<sup>14</sup> But, as he is seeking to recover for injury to an interest of his own — an interest quite distinct from that which the person injured has in himself, and as the law allows recovery against either of two joint tort-feasors, it seems contrary to principle or policy to impute to him the negligence of the person injured.<sup>15</sup> The authorities, however, do not accept this view, and apparently sanction a third rule of imputed negligence to the effect that when A sues B for an injury done to C, the negligence of C will be imputed to A.<sup>16</sup>

#### THE MORTGAGOR'S RIGHT TO AN ACCOUNT FOR RENTS AND PROFITS. —

In those states which retain the English theory of mortgage, a payment or tender on the law day automatically revests title in the mortgagor.<sup>1</sup> As a matter of principle tender alone, being ineffective to extinguish the debt, should not have this effect. Nor should payment at any time other than the law day; for, although a personal satisfaction between the parties, such a payment is not a proper performance of the condition in the conveyance. By the weight of authority, however, payment at any time before maturity revests the title.<sup>2</sup> Where the lien theory of mortgage prevails, a natural result of the fusion of law and equity on which this conception is based is, that payment of the debt either before or after the law day releases the mortgagee's lien.<sup>3</sup> Some courts have gone further in holding that a tender after maturity and before foreclosure releases the lien although it does not extinguish the debt.<sup>4</sup> But these decisions are against the weight of authority,<sup>5</sup> and are clearly unjustifiable; for even in equity the lien subsists until the debt has been actually paid.<sup>6</sup>

ing that the law overlooks the nominal plaintiff for the beneficiary, or that it imputes negligence from the beneficiary to the plaintiff under our second rule, is immaterial.

<sup>11</sup> BEACH, CONTRIBUTORY NEGLIGENCE, 182.

<sup>12</sup> *Pennsylvania R. R. Co. v. Goodenough*, 55 N. J. L. 577, 587.

<sup>13</sup> *Atlanta, etc. Ry. v. Gravitt*, 93 Ga. 369.

<sup>14</sup> *Bellefontaine Ry. Co. v. Snyder*, 24 Oh. St. 670. [The child was allowed to recover for injuries to herself.]

<sup>15</sup> BISHOP, NON-CONTRACT LAW, § 584. Especially under modern statutes enlarging the wife's independence. *Honey v. Chicago, etc. Ry. Co.*, 59 Fed. 423. (Reversed.)

<sup>16</sup> *Kennard v. Burton*, 25 Me. 39; *Winner v. Oakland Township*, 158 Pa. St. 405, 410; *Chicago, etc. Ry. Co. v. Honey*, 63 Fed. 39, reversing an able decision *contra* in 59 Fed. 423.

<sup>1</sup> See *Shields v. Lozear*, 34 N. J. L. 496, 504.

<sup>2</sup> *Burgaine v. Spurling*, Cro. Car. 283; *Flye v. Berry*, 181 Mass. 442. But see *Watson v. Wyman*, 161 Mass. 96.

<sup>3</sup> See *Shields v. Lozear*, *supra*.

<sup>4</sup> *Kortright v. Cady*, 21 N. Y. 343; *Caruthers v. Humphrey*, 12 Mich. 270.

<sup>5</sup> *Shields v. Lozear*, *supra*. See 18 AM. L. REG. N. S. 182 note; 16 HARV. L. REV. 526.

<sup>6</sup> *Tuthill v. Morris*, 81 N. Y. 94.